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BRIEF OF DEFENDANT-RESPONDENT, KRAVETZ, IN OPPOSITION TO PETITION FOR CERTIORARI*

Statement

Respondent, Kravetz, opposes the petition of the third-party defendant, Charles Chaplin (hereinafter sometimes referred to as "Chaplin") for certiorari to the Court of Appeals for the Second Circuit, touching its order denying Chaplin's application for mandamus, or, in the alternative, for certiorari.

Chaplin (as appears from his petition, R. pp. 4-17) sought, in the Court of Appeals, by either route, to accomplish a reversal of that *part* of a remand order (R. pp. 64, 66) about to be made by Judge Clancy of the United States District Court for the Southern District of New York, which denied Chaplin's cross-motion, responsive to respondent Kravetz's said remand motion, to vacate another and prior order of Judge Clancy. Said prior order had denied a prior motion of Chaplin (as defendant) to quash service of process, accomplished on him, in the District Court, after the cause had been removed.

Removal of the cause from the New York Supreme Court was accomplished on petition of the third-party defendant, United Artists Corporation (a Delaware corporation), upon the alleged ground that, as between itself and defendant-third-party plaintiff, Kravetz (a resident of California, now deceased), there was a separate and independent controversy. In fact, there was only an asserted joint liability of said United Artists Corporation with its third-party co-defendants.

Up to the time of service of federal process upon him, and for sixteen months, Chaplin had remained in California. It was only after removal of the cause that he was found and served with process in the Southern District of New York, while he sojourned, with his wife and four children, and members of his staff, at a hotel there (R. pp. 29-30, 32, 42, 45), before proceeding to permanent residence in

* References to Record are "R. p. "; to Petitioner's Brief, "p. ". Italics, unless otherwise indicated, are ours.

Switzerland, from which sanctuary he now directs his forces (R. p. 70).

Chaplin's statement of the facts omits to recite that at the time of service of process, Chaplin had no dwelling or usual place of abode in California, for, as later events showed, he was on his way out of the country forever (R. pp. 70, 29, 55). Both Chaplin's attorney and his friend, Kelley, in their affidavits, were careful to say only that Chaplin "has been" a resident of California (R. pp. 29, 33). This, though the attorney, who presumably drafted all the papers, knew how to differentiate between "has been" and "is", for he denied that the New York hotel "is" Chaplin's dwelling place. In his testimony, Kelley went no further than to say, what was in effect only hearsay information, that he (Chaplin) "has a home in California"—a statement consistent with the possibility of his having homes elsewhere, as, for instance, in New York City (R. p. 54). Chaplin himself did not testify, either in person, by affidavit, or by deposition, though he had and took ample time (a month) to make his motion (R. pp. 6-7). Only Chaplin's counsel, in the brief here submitted, has screwed up his courage to the point of saying that Chaplin had a "permanent residence" in California (p. 9)—as to which the proof is to the contrary.

Upon service of the District Court process, Chaplin, through his counsel—he having already left the country—moved to vacate the service (R. p. 26), which motion was denied after testimony of his witnesses had been heard and all the issues of fact resolved against him. There was no question but that, with full knowledge of the action, he had evaded service, and that notice of the service had reached him. We do not further elaborate upon the testimony, because the merits of the decision are not here material. The opinion of Judge Clancy states his findings (R. p. 18).

While the issue is not here—because, contrary to petitioner's basic misapprehension, a review of the weight or legal effect of the evidence is not relevant to the present inquiry—it is interesting to observe that *First National Bank & Trust Co.* v. *Ingerton* [C. A. 10] 207 F.

2nd 793, cited by Chaplin (pp. 9, 16), was decided by a divided court—divided "on a question of fact"—the majority affirming an order quashing service of process, only because it was unable to "say that the trial court erred" (p. 795) in appraising the facts. In the case at bar, on the other hand, resolution of an issue of fact was made in favor of validity of the service of process. Chaplin was on his way out of the country *forever,* and, if his New York hotel was not his abode, he had none at all!

Following the denial of his motion to vacate service of process upon him, Chaplin filed an answer, and participated in the taking of depositions (R. p. 70), and, acquired standing, had he so chosen, himself to move to remand the cause (U.S.C.A., § 1448). He never questioned the jurisdiction of the District Court. When respondent Kravets moved to remand, Chaplin made his cross-motion asking "that upon granting said motion to remand this action", the court vacate the order denying his (Chaplin's) prior motion to quash service upon him, and "declare such alleged service to have been null and void." This, upon the sole stated ground that the District Court lacked jurisdiction to act at all, though the reason so urged was utilized as a pretext for the real attack, which was on the alleged error of Judge Clancy's order denying the motion to quash service (R. pp. 64-69).

Chaplin did not oppose the motion to remand—to which there could be no opposition (*American Fire & Cas. Co.* v. *Finn,* 341 U. S. 6). Petitioner's footnote (p. 15), weakly suggesting—contrary to his own petition (R. p. 7)—that, according to *Cohen* v. *Beneficial Loan Corp.* (337 U. S. 541), the order is appealable, proves too much. For, if the order sustaining service is to be deemed sufficiently final to permit of appeal therefrom, then, certainly, no writ should be allowed (*Cohen* case, *supra,* and, also, *Stack* v. *Boyle,* 342 U. S. 1). And, in the face of remand, no appeal may be considered either. This, without further inquiry into the settled policy, both under federal and State rules, that an issue as to service of process is of the kind which is appropriately considered on a review of a final judgment in the case (*Cohen* and *Stack* cases, *supra*).

The prior interlocutory order denying Chaplin's motion to quash said service was, of course, not appealable.

Chaplin's cross-motion having been denied (R. p. 24), and the order in that respect—because it was interlocutory, and, also, because it was a *part* of the remand disposition—being also unappealable, he sought, by mandamus or certiorari, which he asked should be issued by the Court of Appeals, to obtain a review "otherwise" (cf. U.S.C.A., §1447[d]), while, through one device or another (*infra,* p. 7), he prevented the entry of the remand order.

Questions Presented

It is important correctly to gauge the precise and only questions involved in Chaplin's application to this court, for certiorari.*

The fundamental issue is not whether Judge Clancy's denial of Chaplin's motion to quash, was right. None of the writs may be used to supply an appeal from an interlocutory order, where the Congress has said there shall be no appeal from such an interlocutory order; nor would the grant of any writ *for such a purpose,* be auxiliary to the appellate jurisdiction of the Court of Appeals or of this court. Instead, the granting of a writ would by indirection, afford Chaplin an appeal where, by statute, it was intended—and so directed—that there be none. This court, and the Courts of Appeals, have often refused to tolerate any such indirection (*Gay* v. *Ruff,* 292 U. S. 25, 29;

* Except as we do so in our Point V (*infra,* p. 26), we argue in opposition to the petition for certiorari, irrespective of the fact that an order of remand was signed by Judge Clancy, was entered by the Clerk of the District Court, and was subsequently attempted to be vacated. The facts touching thereon—of which we think the court should be apprised—are presented in our motion to supplement the record, handed up concurrently herewith. Copies of the material portions of the District Court's record, are, for the convenience of the Court, annexed to said motion papers as an exhibit. Our observations on this aspect of the matter will be found at page 26, *infra.*

Kloeb v. *Armour & Co.*, 311 U. S. 199, 204; *Borden Co.* v. *Zumwalt* [C. A. 9], 120 F. 2nd 69; *Atchison T. & S. F. Ry. Co.* v. *Smith* [C. A. 9], 47 F. 2nd 223; *Chicago, St. P. M. & O. Ry. Co.* v. *Hensley* [C. A. 8], 25 F. 2nd 861; *Natl. Farmers Bank, etc.* v. *Moulton* [C. A. 8], 32 F. 2nd 78).

Furthermore, if Chaplin's purpose be to test whether service upon him was valid according to Federal rules, the grant of certiorari by this court would be a futile act. For by such a writ, this court would be reviewing, not the merits of the prior order denying Chaplin's motion to quash federal service upon him, but only whether the District Court had power to issue its process, and power to entertain a motion and to decide whether such power existed. As to the District Court's power to issue process, and to decide the application of its own power, the statute is clear enough (U.S.C.A., §§ 1447, 1448). The issue is not that, but whether, on remand, all that went before, would be deemed void, when called in question in the State court, so that the District Court, as a prophylactic measure, should now prescribe what the State court may or may not hereafter do. Even if this court's decision were that, by relation back, the District Court—when it denied the prior motion to quash service of process—acted without jurisdiction, and that, therefore, its order denying the motion was void, the issue as to whether federal process issued in accordance with federal rules, was validly served upon Chaplin, would still, on its merits, be undetermined. We do not anticipate that this court, in the very act of declaring that all that had happened between removal and remand was void, would at the same time exercise a void jurisdiction to characterize the legal effect of the District Court's interim and still interlocutory, and therefore, non-final dispositions, and thus transgress the Congressional mandate, that there shall not be any "review by appeal or otherwise". On the contrary, we should expect the same disposition which this court made in *General Investment Co.* v. *Lake Shore Ry. Co.* (260 U. S. 261), with respect to the federal court's function in reappraising the denial of a motion to quash

service, made, before removal, in the State court:

> "The State court's ruling was purely interlocutory, and its status in this regard was not affected by the removal. Being interlocutory, it was subject to reconsideration, and would continue to be so up to the passing of a final decree. Had the cause remained in the State court, the power to reconsider would have been in that court; but when the removal was made, the power passed with the cause to the district court." (p. 267)

Furthermore, since all that there can be in issue, for the future, is whether the service of process made in the federal court, was accomplished in such manner as to invite respect by the State court, and to what extent the State court may choose to enforce it as valid, it follows that only if, as and when that issue should be determined by the State courts, *adversely* to Chaplin, would he be in a position to ask this court, by certiorari touching the State court's final judgment, to review the *merits* of his claim that federal service of process upon him was not validly made, in accordance with federal rules.

The decisive issue is, therefore, as to whether the District Court, when it granted remand, should also, as part of one and the same order, have vacated its prior order denying Chaplin's motion to quash service upon him—an issue touching the scope and operation of the remand order, as to which issue there may not be any review. Such issue is not different from what it would have been if the District Court had quashed service, and this respondent, on remand, had asked to vacate the order so accomplishing. Thus, it is the *result* of the court's order, rather than the power to make it, which Chaplin challenges.

It was to change the result—*i.e.,* to have the remand order contain an explicit nullification of the prior order, because it had *denied* his motion to quash—that Chaplin made his cross-motion to respondent Kravetz's motion to remand, and, upon the denial of that cross-motion, asked the Court of Appeals for mandamus, and, when that court denied relief, procured, as incident to the application for mandamus, successive stays pending determination of the present application for certiorari.

But stays of what? Clearly, notwithstanding the diplomatic phraseology employed in the stay orders, the stays were of any entry of the *order of remand* which the District Court was about to make, so that an interlocutory order—which had denied a prior motion to quash service, and from which there never was any right to appeal—though it could not be directly reviewed, might nevertheless be indirectly reviewed, and in form vacated for alleged lack of any jurisdiction of the District Court to entertain any motion to quash service of process.

Chaplin has thus far successfully evaded and obstructed operation of the Congressional mandate against review by "appeal or otherwise":

(1) by an *ex parte* request, made by letter to the District Judge, to withhold signing of his order of remand, with which request the District Judge apparently complied out of a proper respect for the Court of Appeals, which had under consideration Chaplin's application for mandamus or certiorari;

(2) by another *ex parte* application, resulting in a stay granted by Judge Augustus N. Hand, which stay the District Judge unwittingly disregarded, when he nevertheless signed a remand order, which was duly entered, and then—once he was informed that such a stay was outstanding—purported, we think, ineffectively, to revoke said remand order (See pp. 26-30, *infra*).

(3) by continuance of such stay, pending disposition of the petition for certiorari now before this court.

All of this, notwithstanding settled law to the contrary!

Accordingly, contrary to the questions posed in Chaplin's brief, the inquiries material to Chaplin's present application for certiorari are rather these:

1. Is it an appropriate exercise of federal jurisdiction—

(a) notwithstanding the Congressional mandate that there may not be an appeal from a mere interlocutory order (which denied a motion to quash service of process on Chaplin), and

(b) notwithstanding the Congressional mandate that an order of remand and, by the same standard, any part, incident or consequence thereof, shall not be reviewed by an appeal from such order of remand, or "otherwise", and

(c) notwithstanding that any vacatur of the prior order would not determine that the federal service of process, judged by federal rules, was void or valid,

nevertheless, indefinitely to project federal control of the case, and, to that end, indefinitely to stay the entry of a remand order, so that this court may review the issue as to whether the District Court—in the light of a subsequent and imminent remand of the entire case—had power to issue its process, and whether its service conformed with federal rules, and to entertain a motion to quash service of process, and decide the motion either way?

2. *If so,* did the District Court, when it decided the prior motion to quash, have jurisdiction to entertain, and either to grant or deny Chaplin's motion to quash service?

3. In any event, is not the petition premature? Should it not await final judgment in the State court, and one which is adverse to Chaplin?

Underlying Chaplin's entire argument—whether in his formulation of "Questions presented" (p. 2), or in his "Reasons for granting the writ" (p. 8), or in the development of subsidiary propositions throughout his brief—there is the fundamental inconsistency between the admission that respondent Kravetz is "entitled to the order of remand" (R. pp. 66, 68), and the realization that the "successive stays" which Chaplin has procured (p. 7) have obstructed the entry of the remand order. All under the pretext that "Petitioner does not seek to review any order of remand", but to have "appropriate steps taken • • • with respect to proceedings taken prior to remand" (R. p. 10), *i.e.,* to amend the order effectuating remand, so that it will vacate interlocutory proceedings! Of course, such an effort touches the remand order itself, and would "review" it, "by appeal or otherwise" (U.S.C.A., § 1447[d]). Otherwise, there would not be any necessity for staying the remand order.

The Disposition by the Court of Appeals

The Court of Appeals, as its opinion shows, answered the first question in the negative, and, therefore, never

reached the second and third. It assigned as its reasons:

(1) a doubt as to whether it had any power to entertain a prayer for any writ;

(2) a conviction that whatever relief Chaplin might ask, was available to him in the New York courts; and, therefore, in the exercise of its discretion, refused to exercise power, if it had it; and

(3) a ruling that, as a matter of law, it was only in the New York courts that any and all adjudication must now be made.

In so disposing of the matter, in the exercise of its discretion, the Court of Appeals followed the rule formulated by this court, in *Ex Parte Bakelite Corp.* (279 U. S. 438), in which this court said:

> "But the doubt need not be resolved now, for, assuming that the power exists, there is here, as will appear later on, no tenable basis for exercising it. In such a case, it is admissible, and is common practice, to pass the question of power and to deny the writ because without warrant in other respects." (pp. 448-449)

To the same effect: *Re Muir* (254 U. S. 522, 533); *Re Hussein Lufti Bey* (256 U. S. 616).

It will appear from our presentation that, not only was the denial of the writ justified, in the exercise of discretion, but that the doubt expressed, as to jurisdiction to entertain an application for mandamus, should well have been resolved in the negative.

POINT I

Since neither an order of remand, nor any part thereof, is in any event reviewable "by appeal or otherwise", and since Chaplin's real grievance is that a different decision should have been made of his prior motion to quash service of process made upon him, which different disposition he would have the District Court reflect as a part of the remand order, neither mandamus nor certiorari is auxiliary to the forbidden appellate jurisdiction, and, accordingly neither writ is an appropriate remedy.

It is well-settled that there may not be any appeal from an order of remand (*Metropolitan Casualty Co.* v. *Stevens,*

312 U. S. 563). The statute explicity so provides:

"An order remanding a case to the State court from which it was removed is not reviewable on appeal *or otherwise.*" (U.S.C.A., Title 28, § 1447[d])

So it was held in *Roche* v. *Evaporated Milk Assn.* (319 U. S. 21) that a Court of Appeals is not authorized to issue a writ of mandamus, except in aid of its own appellate jurisdiction. In view of the fact that no appeal from either of the orders made by Judge Clancy was or is authorized—there was no appeal to the Court of Appeals which could be the subject of protection. Dissatisfaction with the dispositions made does not present any question of jurisdiction. "* * * even if erroneous", there was "involved no abuse of judicial power * * *" (*Roche* case, p. 27; *cf.*, a similar ruling on diversity citizenship, incident to remand: *Polito* v. *Molasky* [C. A. 8], 123 F. 2nd 258, 261; cert. den. 315 U. S. 804).

Nor is it permissible for Chaplin, in his eagerness to accomplish an appeal from Judge Clancy's order denying his motion to quash service, to anticipate a remedy which he may invoke only should a judgment eventuate against him in the State court.

As was said in *Re Muir* (254 U. S. 522):

"The suit is still in the interlocutory stage. The court may take up again the question of its jurisdiction. If it does, the inquiry may proceed on other lines and the facts may be brought out more fully than before. In addition, the question may be reexamined in regular course on an appeal from the final decree." (p. 533-534)

It is both federal and New York policy to consider matters touching service of process, as a part of the review of the final judgment (F. R. C. P. 4; N. Y. Civ. Pr. Act, § 237a). "Where the appeal statutes establish the conditions of appellate review, an appellate court cannot rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy * * *" (*Roche* case, p. 30).

As this court, in the *Roche* case, pointed out, it was to avoid untold delay that "this court has consistently re-

fused to sustain the use of mandamus as a means of reviewing the action of a district court in denying a motion to remand a cause to the State court from which it had been removed" (p. 30).

Yet, the record before this court shows, not only such delay, but indefinite stay of entry of the remand order itself, in violation of settled authority, as it was both prior to the last revision of the Judicial Code and as it is now. So this court, quoting from *In re Pennsylvania Co.* (137 U. S. 451, 454), in *Employers' Reinsurance Corp.* v. *Bryant* (299 U. S. 374), said that "the use of the words 'such remand shall be immediately carried into execution'", contained in the former statute, "is strongly indicative of an intent to suppress further prolongation of the controversy *by whatever process*" (p. 380). And in *United States* v. *Rice* (327 U. S. 742, 748-9), this court said that such phraseology was used "to make doubly certain" that there would be no delay, and continued:

> "Congress, by the adoption of these provisions, as thus construed, established the policy of not permitting interruption of the litigation of the merits of a removed cause by prolonged litigation of questions of jurisdiction of the District Court to which the cause is removed. This was accomplished by *denying any form of review* of an order of remand, and, before final judgment, of an order denying remand. In the former case, Congress has directed that upon the remand the litigation should *proceed* in the State court from which the cause was removed." (pp. 751-2)
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> • • •
>
> "Statutory language and objective, thus appearing with reasonable clarity, are not to be overcome by resort to a mechanical rule of construction, whose function is not to create doubts, but to resolve them when the real issue or statutory purpose is otherwise obscure." (pp. 752-753)

Applying these standards, it is clear that any stay of entry of the remand order is wholly unauthorized.

It is no answer to these settled and fundamental principles that, as Chaplin asserts, had the case continued in

the District Court, and had it eventuated in an adjudication against him, he would, as an incident of an appeal from any such *adverse* final judgment, have had the opportunity to have the Court of Appeals review the propriety of the District Judge's order denying his motion to quash service. For:

1. The policy of the law is that there be no review of an interlocutory order, such as this, except after final judgment.

2. That there cannot be any federal final judgment at all—by reason of a supervening rule of public policy reflected in the remand of the cause—does not justify a review where it has been decreed that there should be none. There will be a State final judgment to which this court's certiorari may run.

3. There may not be any presumption—and Chaplin would be the last to urge one—that a federal final judgment would have been, or that the State final judgment will be, adverse to Chaplin.

4. Even had there been no motion to remand, there could never have been a review by the Court of Appeals, even after final judgment, because—*as is conceded*—the cause should never have been removed—an objection which would survive on appeal, even on the court's own motion (*American Fire & Cas. Co.* v. *Finn,* 341 U. S. 6). The remand of the cause was inescapable, and would have prevented any review of the interlocutory order.

5. The Congress having provided that there should be no appeal from a mere interlocutory order denying a motion to quash service, there may not be made available a substitute writ, either of mandamus or certiorari, thus "otherwise" affording an improvised appeal and thereby violating two mandates: (a) that there shall not be any review of this type of interlocutory order, and (b) that there shall not be any further exercise of jurisdiction, except to remand the case to the State court.

6. The right to appeal is statutory. There is no inherent right to an appeal. There may not be a grant of an equivalent method of review, in contravention of the mandate of Congress, any more than jurisdiction may be exercised when Congress has commanded it must be relinquished.

A federal judge should not be mandamused to purport to act with jurisdiction, as he recognizes (as petitioner

would have it) that he has none and, therefore—because he must—remands the case to the State court. It is no part of that surrender of authority to issue final instructions and elucidations to the succeeding State jurisdiction. (cf. *In Re Greenlie-Halliday Co.* [C. A. 2], 57 F. 2d 173.)

As was said in *Thompson* v. *Kelly* [C. A. 8] (170 F. 2nd 213), quoting from *Wabash Ry. Co.* v. *Woodrough* [C. A. 8] (29 F. 2d 832):

> "'* * * The order was one which the court was authorized to make. That action was final and conclusive, and is not open to review either directly or indirectly, either as to the exact question to be passed upon or *as to the result.* * * *'' (p. 214)

To the same effect: *Larsen* v. *Switzer* [C. A. 8], 183 F. 2nd 850; cert. den. 340 U. S. 911; *United States* v. *Fee* [C. A. 9], 138 F. 2d 158; *Mutual Life Ins. Co.* v. *Holly* [C. A. 7], 135 F. 2d 675; *Carr* v. *Donohoe* [C. A. 8], 201 F. 2d 426.

The issue is not different because it is the service of federal process which furnishes the occasion for controversy, nor can it be material that the order touching the validity of service of process, as here, denied a motion to quash service, instead of granting it. So, in *Employers Reinsurance Corp.* v. *Bryant* (299 U. S. 374), further process was issued out of the District Court, challenged and set aside (p. 376), and, thereupon, an order of remand made. A petition for mandamus to vacate the remanding order was denied.

Even were there a mooted question of jurisdiction—as there is not in this case—the result would be the same. So, in *Re Hussein Lufti Bey* (256 U. S. 616), the issue presented was one touching process and jurisdiction. This court said: "It is not plain that there is an absence of jurisdiction here * * *. We regard the situation as one in which to refuse the writ would be a proper exercise of discretion" (p. 619).

In the foregoing discussion, we have considered, for the most part, only the application for writ of mandamus. We need not dwell as long upon the request, in the alter-

native, for writ of certiorari. Such a writ, it is elementary, is not available except where there is no appeal possible, but where there is lacking any prohibition against any review. Obviously, where the policy of the Congress was to eliminate any review, by appeal or "otherwise", to grant a writ of certiorari as a substitute for an appeal, would be to violate the mandate that an order of remand should not be "reviewable on appeal or otherwise".

A fortiori, as to a *stay* of a remand order!

POINT II

The federal court, in the interval between removal and remand, acted with jurisdiction, and, therefore, validity attached to whatever was done in that interim period, subject, after remand, to reappraisal by the State court.

According to petitioner, for almost three years, the case was in limbo*—certainly not pending in the State court (U.S.C.A., § 1446[e], § 1447[c]; Moore's Commentary on the U. S. Judicial Code, pp. 272-277), and, as Chaplin would now have it, not in the District Court either. A strange conclusion, not too readily to be accepted as correct! For its consequence is that, through removal accomplished by one of the third-party defendants, United Artists Corporation—which was controlled by Chaplin and his third-party co-defendants (R., pp. 36, 38)—Chaplin was rendered immune from the processes of justice.

But it is plain that the District Court did have jurisdiction.

In *American Fire & Cas. Co.* v. *Finn* (341 U. S. 6), though a judgment was vacated for lack of federal jurisdiction, this court nevertheless foreshadowed, in a footnote to its opinion (p. 18) that, notwithstanding its vacatur, a dismissal might be had as to the offending defendant,

* The remand order, except for the mandamus proceedings, would have been signed on January 26, 1954; it was signed on February 15, 1954, and cancelled on February 16, 1954 (See annex to motion submitted herewith); and, whatever be its present status, is now subject to the stay of this court.

and "a new judgment can be entered on the old verdict without a new trial"—as was, thereafter, in fact done (*Finn* v. *Am. Fire & Cas. Co.* [C. A. 5], 207 F. 2nd 113). The Court of Appeals said:

> "* * * federal jurisdiction was imperfect or defective, but it was not wholly lacking. The district court had jurisdiction to determine its own jurisdiction, to order the pleadings recast and the parties realigned according to their real interests, and at any time before final judgment to dismiss or remand for want of federal jurisdiction as justice required, 28 U.S.C., § 1441(c)." (p. 115)

A far cry from the assertion of Chaplin, here, that all in the interval between removal and remand, was void!

The removal statute itself, as we now have it, demonstrates that, inherent in the removal-remand concept of jurisdiction, is the power and discretion vested in the court, to make the decision—not only as to whether it will retain the case, as a whole, but as to whether, in the exercise of its discretion, it will choose to remand a part. The District Court

> "*in its discretion*, may remand all matters not otherwise within its original jurisdiction" [U.S.C.A., § 1441(c)]

Such a jurisdiction is not void, though its acts, upon remand, may be subject to State court reappraisal. Otherwise, since, under the present Judicial Code, the State court may not act (Moore, Commentary on the Judicial Code, p. 217, ¶ 0.03[31]), there would be a hiatus in which justice would founder altogether.

Only the federal court has the power to decide whether the removal was authorized. The question is a "federal one", and "the State court is given no right to review or control the exercise of the jurisdiction of the federal court" (*Chesapeake & Ohio Ry. Co.* v. *McCabe*, 213 U. S. 207, 220). Upon removal, "the State Court shall proceed no further unless and until the case is remanded" [U.S.C.A., § 1446, subd. (e)]. The power to decide the issue of removability, is a part of the federal court's jurisdiction. Another part is the authority to bring in new parties,

such as the petitioner herein. So, the removal statute explicitly declares that, after removal:

> "In any case removed from a State court, the District Court may issue all necessary orders and *process* to bring before it all proper parties whether served by process issued by the State court or otherwise." [U.S.C.A., § 1447 (a)]

Furthermore,

> "In all cases removed from any State court * * * in which any one or more of the defendants has not been served with process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in such District Court." (*id.*, § 1448)

And defendants so brought into the federal court, by its process, acquire status to move the court's action:

> "This section shall not deprive any defendant upon whom process is served after removal of his right to move to remand the case." [U.S.C.A., § 1448]

And it is only on remand that:

> "The State court may thereupon *proceed* with such case." [*id.*, § 1447(c)],

reaching back, if it sees fit to do so, to reappraise what was done by the federal court, in its interim jurisdiction. This would not, as petitioner suggests (p. 15), be by way of State appellate "review" of what was done by the District Court, but rather by way of its independent prerogative of reappraisal of what was done in the federal court, and as to what validity the State court may choose to assign to it (cf. *Tillman* v. *Russo-Asiatic Bank,* 264 N. Y. 467; also *General Investment Co.* case, *supra*).

The issue of "jurisdiction", upon which Chaplin predicates his petition to this court, is therefore spurious.

When there is remand, the District Court does not thereby certify that it has never had "jurisdiction", but only that it should not, in its omnipotence, have exercised its undoubted jurisdiction. Remand is truly an act of abnegation.

Accordingly, no inference is implicit, in the remand of a cause theretofore removed, that all that occurred in the interval is to be deemed void. Rather, the most that may be said is that, after remand, what occurred in the interval between removal and remand may be disregarded, by the State court, if it should so decide. So, depositions taken may retain their vigor (*Ayers* v. *Wiswall,* 112 U. S. 187); a warrant of attachment vacated, may remain vacated (*Tillman* v. *Russo-Asiatic Bank,* 264 N. Y. 467); State process vacated by the federal court, unless transgressing constitutional limits, need not be, but may be, reinstated.

So real has been the federal court's jurisdiction, that the parties have it within their power, even in a case in which remand should have been made, to permit the District Court to render a valid judgment, which will not be subject to collateral attack (*Chesapeake & Ohio Ry. Co.* v. *McCabe,* 213 U. S. 207, and cases cited; *In Re Metroplitan Trust Co.,* 218 U. S. 312; *Des Moines N. & R. R. Co.* v. *Iowa Homestead Co.,* 123 U. S. 552; *Dowell* v. *Applegate,* 152 U. S. 327; *Chicot County Dist.* v. *Bank,* 308 U. S. 371, 376; *Stoll* v. *Gottlieb,* 305 U. S. 165, 171; *Windholz* v. *Everett* [C. A. 4] 74 F. 2d 834. See also, Moore, *Commentary on the Judicial Code,* p. 219, para. 0.03 [31]).

As these cases hold, proceedings in the federal court, between removal and remand, are not nullities.

Nor would a judgment succumb, even to *direct* attack, where there was original diversity jurisdiction, in the first instance, and judgment has resulted, or where there has been only modal or formal defect, in the removal proceedings, or where, by the time of judgment, the conditions for removal jurisdiction—at any rate, of the parties—had been acquired (*American Fire & Cas. Co.* v. *Finn,* 341 U. S. 6, 16).

Furthermore, there was always original jurisdiction, in the case at bar, between the removing third-party defendant (United Artists) and the third-party plaintiff (Kravetz). Remand was required, not because there was lacking

diversity of citizenship as between the two, but because there was not, as required by the removal statutes, a separate and independent cause of action between them, as distinguished from other parties. Such a defect, while requiring remand, did not run afoul of constitutional, as distinguished from removal prerequisites (cf. U. S. Constitution, Art. III., and U.S.C.A., § 1332, with U.S.C.A., § 1441 [b]; also, on an analogous phase, *Polizzi* v. *Cowles Magazines,* 345 U. S. 663, 665). Because the third-party plaintiff (California) could have sued the removing third-party defendant (Delaware) as the sole defendant, the federal courts would have had original diversity jurisdiction, and, therefore, whatever was done in the interval between removal and remand, was not void (*Des Moines N. & R. R. Co.* v. *Iowa Homestead Co.,* 123 U. S. 552; *Guarantee Co.* v. *Mechanics, etc.* [C. A. 6], 80 F. 766; cert. den. 169 U. S. 736; *Phila. & Boston Face Brick Co.* v. *Warford* [C. C. Mass.], 123 F. 843; *Monroe* v. *United Carbon Co.* [C. A. 5], 196 F. 2nd 455; *Strickland Transportation Co., Inc.* v. *American Dist. Co.* [C. A. 5], 198 F. 2nd 546; *Bailey* v. *Texas Co.* [C. A. 2], 47 F. 2nd 153).

It is not surprising that, overlooking all of these considerations, petitioner reveals the lack of any sound basis for his application, in confused and inconsistent characterizations of the District Court's conduct in the interval between removal and remand.

So, at page 5, petitioner incorrectly states that, "concededly", the District Court "never acquired valid jurisdiction over the action"—thus confusing statutory prerequisites to removal, whether properly or improperly observed, and the exercise of a jurisdiction, nevertheless existing by reason of compliance with constitutional requirements.

And, at page 11, petitioner refers to "lingering after-effects in the subsequent proceedings" of orders which, he asserts, are void—thus ignoring that, if void, said proceedings are just as void when called into question in the State courts, which should be afforded the opportunity, in the first place, to make their own decision.

Yet, thereafter, petitioner recognizes that, once the cause has been removed, whether rightly or wrongly, the federal court has jurisdiction. For he asserts: "It cannot be denied that, following removal, the case was in the federal court," and that the "law may be" that a State court "has no power to affect orders made under the paramount authority of the United States courts in a period in which a case was under their control" (p. 15). How, if void?

And, later, petitioner again confuses the concept of authority to remove, with that of authority to control the cause, once removed, when he asserts that "The acts of the federal court were the acts of a tribunal whose acquisition of control over the action was without basis" and, therefore, "voidable" (p. 19)—something, of course, different from "void"; and, again, that the District Court "had no jurisdiction over the subject-matter of the action" and, therefore, "did not acquire valid jurisdiction over the person of petitioner" (p. 21).

Finally, petitioner utterly confuses the District Court's power to exercise jurisdiction, with the "right" and "wrong" of the result accomplished. So, petitioner asserts that the District Court never acquired "rightful jurisdiction", and that it had a "wrongful jurisdiction" (p. 21).

And the climax is reached when, though asserting that all that the District Court did was void, petitioner nevertheless asserts that what is void for the federal court, may for the State court, become valid, and be handed over as such, and that, accordingly, the federal court's "refusal" to vacate its own orders "constitutes an attempt to exercise an unwarranted control over the subsequent course of the action", and that, consequently, there will be "an unjustifiable enlargement of the rights of respondent at the expense of the rights of petitioner", since the District Court "proposes to convey" its jurisdiction "to the State court" (p. 22). How, if the District Court had none?

Only from confusion worse confounded, may such strange powers be ascribed to a void jurisdiction!

A jurisdiction which will not brook interference by the State courts, and is so fluid that the statutory prerequisites to removal, if violated or lacking, may be supplied until judgment is rendered, and even on a new trial after a prior judgment has been vacated for failure to satisfy those prerequisites, and whose intermediate orders—including service of process—are authorized by statute and enforced in the federal court as effective, and the effectiveness of all of which depends upon the federal court's own *ipse dixit,* can hardly be said to be void! Certainly, not on a record such as that here, in which the undoubtedly *existing* facts establishing that there was diversity of citizenship in accordance with constitutional standards, are not shown by the record! (We offered to stipulate on these facts, but petitioner refused.) A disposition as far-reaching as that which Chaplin seeks, should await a record in which all that is material will be developed, not suppressed.

POINT III

Upon remand, the case goes to the State court in its status as just before the remand.

The following authorities establish that, when the District Court, on remand, relinquishes its hold, it should send the case back as at the time just before remand, so that the State court may then proceed as it sees fit. The District Court should not fashion a mould within which the State court must act. (*Marchant* v. *Mead-Morrison Mfg. Co.* [C. A. 2] 11 F. 2nd 368).

That a pending appeal is thus cut off, is immaterial:

"The right of an appeal is not inherent. It is purely a matter of statute." (*In Re Maryanov,* 20 F. 2nd [D. C. E. D. N. Y.], 939, 941, citing *National Bank* v. *Peters,* 144 U. S. 570; see, also, *Nat. Farmers Bank* v. *Moulton* [C. A. 8], 32 F. 2nd 78.)

As was said in *United States* v. *Rice* (327 U. S. 742):

"upon the remand the litigation should proceed in the State court from which the cause was removed." (pp. 751-2)

As was said in *Cates* v. *Allen* (149 U. S. 451):

"It will be for the state court to determine what orders should be made, if any, in regard to the amounts complainants have received under the decrees of the circuit court." (p. 461)

As was said in *Metropolitan Cas. Co.* v. *Stevens* (312 U. S. 563), with respect to the State court's prerogatives in a remanded case, as to proceedings in the federal court:

"* * * it was for that court to determine the effect of the disclosure filed in the federal court." (p. 569)

As was said in *Ayers* v. *Wiswall* (112 U. S. 187):

"It will be for the State court, when the case gets back there, to determine what shall be done with pleadings filed and testimony taken during the pendency of the suit in the other jurisdiction." (pp. 190-191)

Petitioner's reliance upon *Ayers* case (*supra*), to show that, on remand, all interlocutory proceedings should be declared void is quite mistaken. The provision upon which petitioner relies was contained in the order of the District Court, and was incident to the District Court's ruling that, because there was no jurisdiction, the proceedings in the cause should be set aside and the cause remanded—*i.e.*, the mere generalizations following a holding of lack of jurisdiction. In any event, that provision was not the subject of controversy on appeal. On the contrary, all that was in issue was whether the cause should be remanded, and all that the court decided was that a remand was proper, and, in the course of that decision, made the observation that what should happen to interlocutory proceedings would be for the State court to determine. The distinction which petitioner suggests, between what was done by the federal court, and what was done by the parties, is without substance. In the first place, *Brown* v. *Fletcher* [C. A. 2] (206 F. 461, 465), which petitioner cites, was reversed by this court in 237 U. S. 583. In the second place, the phraseology which petitioner quotes referred to nothing here material, but only as to what effect might, in the State court, have been given to an appearance made by the complainants in the federal court, had the fact of such appearance been

certified in the remand papers—which attaches validity rather than invalidity to what was done in the federal court.

In *Gurnee* v. *County of Patrick* (137 U. S. 141), it was held that, although the court had sustained a demurrer to the complaint, no appealable judgment resulted, because the court had, *as a part* of the same disposition, remanded the case to the State court.

Uniformly to the same effect, and holding that it is for the State court to determine "the effect" of federal interim orders: *Metropolitan Casualty Co.* v. *Stevens,* 312 U. S. 563, 569; *Mayflower Industries* v. *Thor Corp.* [C. A. 3], 184 F. 2d 537; cert. den. 341 U. S. 903; *Broadway Ins. Co.* v. *Chic. G. W. Ry. Co.* [C. C. W. D. Mo.], 101 F. 507; cited with approval in the *Metropolitan* case, 312 U. S. 563, *supra; Doran* v. *Elgin Coop. Credit Assn.* [D. C. Neb.], 95 F. Supp. 455; *Levine* v. *Buick-Olds-Pontiac Sales Co.* [D. C. Ohio], 12 F. Supp. 547; *Ransom* v. *Sipple Truck Lines* [D. C. Iowa], 52 F. Supp. 521; *Kristiansen* v. *National Dredging Co.* [D. C. E. D. N. Y.], 4 F. Supp. 925; *Olds* v. *Brown Shoe Co.* [D. C. Mo.], 25 F. Supp. 880.

In *Iowa Central R. Co.* v. *Bacon* (236 U. S. 305), the point is succinctly made that any adjudication of the federal court, short of *judgment,* need not be respected.

Indeed, in *Waco* v. *U. S. Fid. & Guar. Co.* (293 U. S. 140), upon which Chaplin mistakenly relies, this court reversed an order which had violated these principles, so that the *status quo* as at the time just before remand, should be restored, and all phases of the case left for disposition by the State court. In this court, the defendant complained that, in further proceedings in the State court to which the cause had been remanded, the federal dismissal of its third-party cross-claim would be "treated as conclusive." This court observed that the Court of Appeals did not intend any such result, for, in its opinion, the Court of Appeals had said that all matters were for the State court's action, "unaffected by the *attempt* of the Federal Court to dismiss the City's cross-action * * *," and, accordingly, held that the Court of Appeals should have consid-

ered, on its merits,* defendant's appeal, from the judgment of the District Court dismissing the cross-claim, as, otherwise, "the cross-action will be no part of the case which is remanded to the State court." (p. 143)

The rationale of the decision was that the case should go back on remand as it was just before remand, *i.e.*, that the federal court, when it orders remand, should do that and nothing more:

> "Indeed, if the District Court was right, *the cause could not have been remanded except for the exclusion of the Fidelity Company as a party.* True, no appeal lies from the order of remand; but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause. *Indisputably this order is the subject of an appeal;* and, if not reversed or set aside, is conclusive upon the petitioner.
>
> * * *
>
> "A reversal cannot affect the order of remand, but it will at least, if the dismissal of the petitioner's complaint was erroneous, *remit the entire controversy, with the Fidelity Company still a party, to the State court for such further proceedings as may be in accordance with law.*" (pp. 143-144)

It will be observed that in the *Waco* case, there was no stay of the remand order, which had become operative—so divorced from the remand was the final judgment which had preceded it. *But here, petitioner recognizes that what it seeks is a part of the remand disposition!*

The conclusion reached in the *Waco* case would be impossible, unless what is done by the District Court, between removal and remand, is deemed not void, but valid. It was therefore that the District Court should have remitted

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* As shown by *Pabellon* v. *Grace Line Inc.* [C. A. 2] (191 F. 2nd 169, cert. den 342 U. S. 893), as the law then stood (see p. 173), the dismissal of the cross-claim resulted in an appealable judgment, which—because it was not an incident of remand, as in the *Gurnee* case (*supra*), but the foundation for and cause of remand—was appealable—for, if reversed, there would be no basis for remand.

"the entire controversy, *with the Fidelity Company still a party,* to the State court for such further proceedings as may be in accordance with law" (pp. 143-4).

Whose law, if not that of the State?

Indeed, the post-remand opinions of the Texas courts, in the *Waco* case, show that the Texas courts proceeded "regardless of the procedure had in the federal court" (U. S. *Pipe & Foundry Co.* v. *City of Waco,* 100 S. W. 2d 1099, 1110-1111; aff'd 108 S. W. 2d 432, (p. 1111). Indeed, there is no reference to the disposition made by this court in 293 U. S. 140, although the Court of Appeals, in obedience to this court's mandate, had reinstated the cross-claim theretofore struck out (*City of Waco* v. *U. S. F. & G. Co.,* [C A. 5], 76 F. 2d 470). Moreover, this court thereupon denied certiorari to the State court (302 U. S. 749).

Petitioner's argument, touching the *Waco* case, defeats itself (p. 12). If a Court of Appeals may review a final judgment, dismissing a cross-claim, this is not because the District Court lacked jurisdiction, but because it had it, and because it was not the kind of adjudication which would survive the final State judgment so as, at that time, to be subject to review by this court (cf. *Cohen* v. *Beneficial Loan Corp.,* 337 U. S. 541, 545-7).

There is nothing about the issue as to whether service of process made upon Chaplin in the District Court was valid, which changes the rules thus applicable. An issue as to process is not different from any other issue. The Congressional mandate is not subject to any exceptions. The inhibition of any review, by appeal or otherwise, is absolute.

So, the New York Court of Appeals, in affirming an order of the New York Supreme Court, made after remand, certified the *nunc-pro tunc* validity of an order of the District Court, vacating a warrant of attachment on which jurisdiction depended: "The effect of the ex parte order at Special Term was merely to create a notation on the record of valid action taken by the Federal court" (*Tillman* v. *Russo-Asiatic Bank,* 264 N. Y. 467, 468).

POINT IV

Petitioner, if he has any grievance, has an adequate remedy in the New York courts and, in the event of an adverse final judgment, in this Court.

Chaplin's fears—that he may not be heard in the New York courts, to challenge the service of process upon him—are without foundation. It is plain that N. Y. Civil Practice Act, § 237a, reflects substantially the same special appearance procedure, available to Chaplin in the New York courts, as would have been available to him, in the District Court under F.R.C.P. 4.

The New York statute, insofar as material, is sufficiently set forth in Appendix A of Petitioner's Brief, but is not correctly apprehended.

The operation of the mandate of the New York statute, *i.e.*, that "After a motion made pursuant to this section has been denied, the defendant may litigate the action on the merits, without being deemed to have waived his objection to the court's jurisdiction over his person", is not limited to a case in which the objection to jurisdiction was made, literally under section 1. The phrase, "pursuant to this section", as used in Subdivision 4, refers back to the "manner" in which the objection was raised, under Subdivision 1. Surely, Chaplin's motion, in the District Court, was made in identical "manner".

Furthermore, there was and is no possibility that the New York courts may deem that Chaplin appeared generally. For, certainly, under the federal practice, he did not do so; and, since he was not a party to the action before its removal from the State court to the federal court, but was served with process in the federal court only after removal, the act of another party, in removing the cause, may not, be deemed a general appearance by Chaplin (*General Investment Co.* v. *Lake Shore Ry. Co.*, 260 U. S. 261, 267). *Henderson* v. *Henderson* (247 N. Y. 428), cited by petitioner (p. 13) has no application. There, appearance was made by conduct during the trial. Furthermore, whether or not a court has jurisdiction of the person of a defendant, is, of course, a basic question, in the New

York courts as elsewhere (*Olmstead* v. *Olmstead,* 190 N. Y. 458, 466; *Hunt* v. *Hunt,* 72 N. Y. 217, 225). If there be any merit to Chaplin's assertions that he was never made a party, whether the federal court lacked jurisdiction to make him one, or the service was not made upon him in accordance with federal rules, he may be heard, after he has cause to complain, should judgment go against him in the State courts, and should this court conclude to hear him (*McDonald* v. *Mabee,* 243 U. S. 90; *Milliken* v. *Meyer,* 311 U. S. 457). It is, therefore, contrary to Chaplin's fears, impossible for the New York courts to "foreclose" (p. 10) consideration by this court of the issue of jurisdiction of Chaplin's person.

No reason appears, therefore, for piecemeal appeal, such as Chaplin seeks, by indirection, to accomplish at this time.

Furthermore, were Chaplin's views to be adopted, the New York courts would be deprived of all choice. They could not recognize the federal service of process upon Chaplin, because he would have been eliminated prior to remand. Nor could they bring him into the action by their own process, for, safe in Switzerland, Chaplin is no longer available.

Chaplin's rights may be protected, and respondent Kravetz's too, only by sending the case back in its present status, so that the State courts may be able to exercise their own discretion, and so that, in due course, should their decision be to sustain the federal service of process, this court, in the light of all that has gone before, may consider whether it will decide the real issue—at this time, not open for review—*i.e.,* as to whether there was valid service of process according to appropriate standards.

POINT V

Remand has already become effective.

We have argued thus far without the aid of the following additional circumstances, which will not require consideration if Chaplin's application be disposed of upon the grounds thus far urged.

On February 15, 1954 (after the date of the issuance, in the mandamus proceeding, of Judge Augustus N. Hand's

stay of "all proceedings", but before notice thereof had come to the District Judge), Judge Clancy signed an order of remand, which was entered. Thereafter, on February 16, 1954, upon being made aware of Judge Hand's order, and of Chaplin's pending application in this court, Judge Clancy obliterated and cancelled his signature on the order already entered and filed, but not until the copy of the remand order had been certified, and nothing remained to be done but for the District Court Clerk to perform the ministerial act of mailing a certified copy of the order to the Clerk of the New York Supreme Court (See excerpts in accompanying motion).

The question is thus presented as to whether remand had not already become irrevocably effective.

Under the present statute, the former provision that the "remand shall be immediately carried into execution", no longer exists, but, instead, under U.S.C.A., § 1447(c), the order of remand is self-executing—the ministerial act of mailing a copy of the remand order, having for its purpose, not to put the remand order into execution, but to give the State court notice of the remand so that it may proceed (cf. analogous discussion in *Railroad Co.* v. *Koontz,* 104 U. S. 5, 14)*. So, whereas, on removal, § 1446(e) provides that "the State court shall proceed no further unless and until the case is remanded", § 1447(c) provides that, on remand, "A certified copy of the order of remand shall be mailed by its [the District Court's] clerk to the clerk of the State court. The State court may thereupon proceed with such case." It seems impossible to conclude that whether or not a Clerk of the District Court promptly per-

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* Rule 3 of the Civil Rules of United States District Courts for the Southern and Eastern Districts of New York, provides that counsel shall implement the Clerk's ministerial act. That Rule provides, in Subdivision (c) thereof:

"(c) Upon the entry of an order remanding a case to the state court, the plaintiff shall deposit with the clerk a copy thereof to be certified and mailed by the clerk to the clerk of the state court."

forms his duty of mailing a copy of the remand order, can have the effect of postponing or obstructing the effectiveness of a judge's remand order. As said in an analogous situation, the entering of the record is not necessary "for the transfer of jurisdiction" (*Railroad* case, *supra*, p. 15). True, Moore, in his Commentary on the Judicial Code, may be read to opine that the omission, in the present statute, of the phrase "such remand shall be immediately carried into execution", was "inadvertent" (p. 227), and that, therefore, the supposed rule of *Bucy* v. *Nevada Const. Co.* [C. A. 9] (125 F. 2nd 213)—*i.e.*, a dictum by a divided court, that the District Court had power to vacate its own order of remand—"should be true under the amendment of 1949". But, on analysis, it will be found that Moore's speculation is not supported either by the *Bucy* case (*supra*), or by the 1949 amendment of the Judicial Code; nor is the nullification which the *Bucy* case works of the phrase "such remand shall be *immediately* carried into execution" authorized by the contrary mandate repeatedly uttered by this Court.

The *Bucy* case (*supra*) decided that, where the federal court was *authorized* to remove the cause, an order of remand erroneously holding otherwise—if revoked and followed by acquiescence of the parties to and through judgment—might under these "special circumstances" be disregarded. The court divided on whether or not the "special circumstances"—*i.e.*, that, in fact, there had been an *authorized* removal—should make any difference. The *Bucy* case does not hold that where, as here, the case should never have been removed, a remand order once made may be revoked and jurisdiction continued. On the contrary, the *Bucy* case is quite consistent with the authorities holding that where there never was authority to remove, the remand order is self-executing. (*Garrison* v. *Atlantic Life Ins. Co.* [D. C., E. D. S. C.], 18 F. Supp. 469; *Leslie* v. *Floyd Gas Co.* [D. C., E. D. Ky.], 11 F. Supp. 401; cf. exposition in the dissenting opinion in the *Bucy* case.)

With reference to the 1949 amendment of the Judicial Code, Moore says, at page 227: "The seventh sentence of former § 71 provided that if the District Court ordered the case remanded, 'such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the District Court so remanding such cause shall be allowed.' Inadvertently, this was omitted in the new Code, *but its substance has been added by the Amendatory Act of 1949.*" Not so, however, unless the amendment be construed to eliminate the gloss put upon the word "immediate", by the *Bucy* case! It is more reasonable to suppose that the Congress omitted the "immediate" execution phrase because the *Bucy* case had distorted it into the negative of what it said. At any rate, the 1949 amendment added only Subd. (d) of § 1447, touching review, and nothing else. So, Moore correctly appreciates, at another point: "While the Code as originally enacted inadvertently omitted the former provision that a remand order made by the district court *is not reviewable,* the Amendatory Act of 1949 *so provides*" (p. 91). The only inadvertence—*i.e.,* the omission to provide against review, by appeal or otherwise—was all that was corrected in 1949 (§ 1447[d]; cf. Moore, pp. 91, 217, 280-281). When the 1949 amendment provided that the remand order should not be "reviewable on appeal *or otherwise*", it forbade vacatur too. Jurisdiction once lost could not be reviewed. For, otherwise, prohibition against review would not exclude changes of any kind, whether by appeal "or *otherwise.*" For if a District Judge may, *sua sponte,* vacate his own order, one day after it has been entered, he may do so at any time—even much later—and thus, at will, re-vest a jurisdiction already divested. Thus would the evils of vacillation and delay be perpetuated, though it was the Congressional policy to prevent just that.

To hold otherwise, in the light of what was actually decided, under the special circumstances, in the *Bucy* case (*supra*), and, under distinguishing circumstances, in the *Garrison* and *Leslie* cases (*supra*), is to read into the statute what it does not say, and what is contrary to the policy of the law. The history of the removal statutes may

not be ignored (*United States* v. *Rice,* 327 U. S. 742; *Shamrock Oil Corp.* v. *Sheets,* 313 U. S. 100, 106-7).

Nothing in F.R.C.P. 60(b) is to the contrary. For the power of a judge, on his own motion, to modify or vacate his own inadvertent orders or judgments, must be conditioned upon a continuance of a residual jurisdiction to act at all. A court may not—contrary to the Congressional mandate—mend its hold, where it has lost jurisdiction to hold on at all.

Nor does the fact that Judge Augustus N. Hand—we assume, pursuant to F.R.C.P. 62(g)—purported to issue an *ex parte* stay, in aid of the Court of Appeals' supposed appellate jurisdiction, affect these conclusions. F.R.C.P. 62(g) authorizes a stay of "all proceedings", only in aid of appellate jurisdiction. Here, what was stayed was the execution and operation of a remand order, which was not subject to appeal, in whole or in part. All that had been pending in the Court of Appeals was an application for mandamus or certiorari, to review the scope of a remand order. Such a stay was not in aid of that court's appellate jurisdiction—which did not exist, and the exercise of which, Congress had forbidden. This, even if a "stay of all proceedings", in the wake of a denial of either a writ of mandamus or certiorari, may, by any chance, be deemed a stay of the entry of a remand order in an action, no part of which was or could be the subject of any appeal to the Court of Appeals!

Accordingly, a stay which is unauthorized and, therefore, void, may not be deemed to invalidate a remand order, incapable of review by appeal or otherwise.

POINT VI

The Court of Appeals denied mandamus, not only by reason of its doubt that it had any authority to issue a writ, but in the exercise of a sound discretion, in accord with an unbroken line of authorities. Therefore, under well-settled principles, certiorari by this court is not justified.

It would seem plain that there is here nothing of substance which, under the rules of this court, touching the

grant of its writs of certiorari, at this time deserves review. Not only is there lacking any conflict of authorities, but, on the contrary, what Chaplin seeks would reverse the settled law.

Nor, as we have seen, is Chaplin faced with any exigency as to which he is without remedy in an appropriate forum. Without prejudice, and under rules substantially the same as would have been available to him in the District Court, he may be heard in the New York State Supreme Court. If still dissatisfied, he may, after final judgment, apply to this court.

If there is to be any certiorari—assuming, but not conceding, that an appropriate foundation for such an application may eventuate—such development may occur only after a New York final judgment, adverse to Chaplin, has been entered, presenting the real issue, *i.e.*, as to whether the State court, if it shall have chosen to do so, may give recognition to the federal service of process, and, if it shall have done so, as to whether said federal service of process may, by the State court, within constitutional limits, be deemed valid—an issue which is not now here, and which can never be here if the status of the cause, as it was just before remand, is now disturbed by a premature review of an academic question as to whether the District Court had the jurisdiction which the Congress unmistakably gave to it exclusively.

CONCLUSION

The petition for certiorari should be denied, and the stay vacated.

Respectfully submitted,

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